Supreme Court, U.S.
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89-1188

NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER 1989 TERM

JAMES C. KELLY,

Petitioner,

versus

S. RAY GILL, ETC., ET AL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE FIFTH DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER OR NOT THE STATE COURT OF APPEALS ERRED AS A MATTER OF FEDERAL LAW IN HOLDING THAT THE PLAINTIFF COULD NOT LITIGATE HIS CLAIM UNDER THE FEDERAL CIVIL RIGHTS ACT OF 1871, 42 U.S.C. SECTION 1983, IN STATE COURT BECAUSE THE STATE HAS SOVEREIGN IMMUNITY FROM PLAINTIFF'S ATTEMPT TO ENFORCE FEDERAL CIVIL RIGHTS REMEDIES IN STATE COURT?

II. WHETHER OR NOT THE STATE COURT OF APPEALS ERRED AS A MATTER OF FEDERAL LAW IN HOLDING THE FLORIDA STATUES §112.531 ET SEQ. AND §943.139 DO NOT CONTAIN ALL OF THE FEDERAL LAW REQUIREMENTS TO ESTABLISH A PROPERTY INTEREST IN EMPLOYMENT FOR THE LAW ENFORCEMENT OFFICERS DEFINED THEREIN AND FAILS TO PROVIDE THE LAW ENFORCEMENT OFFICERS DEFINED THEREIN WITH SUBSTANTIVE AND PROCEDURAL DUE PROCESS RIGHTS?

III. WHETHER OR NOT THE STATE COURT OF APPEALS ERRED AS A MATTER OF FEDERAL LAW IN HOLDING THAT THE PLAINTIFF WAS NOT ENTITLED TO ALL OF THE BENEFITS AND PROTECTIONS AFFORDED BY FLORIDA STATUTES §112.531 ET. SEQ?

IV. WHETHER OR NOT THE STATE COURT OF APPEALS ERRED AS A MATTER OF FEDERAL LAW IN HOLDING THAT THE PLAINTIFF WAS NOT ENTITLED TO REASONABLE ATTORNEY FEES AND DAMAGES INCURRED AS A RESULT OF HIS WRONGFUL TERMINATION AND DENIAL OF DUE PROCESS RIGHTS UNDER FEDERAL AND STATE LAW?

PARTIES TO PROCEEDING

The following were parties to the proceeding in the Fifth District Court of Appeal:

1. S. RAY GILL, in his official capacity as State Attorney for the Office of the State Attorney, Fifth Judicial Circuit in and for the State of Florida.

2. Office of the State Attorney, Fifth Judicial Circuit in and for the State of Florida.

3. Robert A. Butterworth, in his official capacity as Attorney General for the State of Florida.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, JAMES C. KELLY, prays that a writ of certiorari issue to review the judgment of the Fifth District Court of Appeal of the State of Florida.

OPINIONS BELOW

The Order of the Circuit Court of the Fifth Judicial Circuit of Florida, granting Summary Judgment is unrecorded and appears at page 12 of the Appendix herein.

The Order of the Fifth District Court of Appeal of the State of Florida entered on June 15, 1989, is recorded at 544 So.2d 1162 (Fla. App. 5 Dist. 1989), and appears at page 1 of the Appendix herein.

The Order of The Supreme Court of Florida entered on October 24, 1989, is unrecorded and appears at page 20 of the Appendix herein.

JURISDICTION

The Final Judgment of the Fifth District Court of Appeal of the State of Florida is dated June 15, 1989.

The decision of the Fifth District Court of Appeal of the State of Florida was timely appealed to the Supreme Court of Florida. The Supreme Court of Florida denied discretionary review on October 24, 1989. This Petition for a Writ of Certiorari is filed timely within ninety (90) days thereof. The jurisdiction of this Honorable Court to review by certiorari is conferred by 28 U.S.C. Section 1257 and Rule 10 of this Honorable Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Federal Civil Rights Act of 1871, 42 U.S.C. Section 1983 reads in full:

> "Every person who, under color of any statutes, ordinance, regulation, custom , or usage, or any State or Territory or the District of Columbia, subject, or causes to be subjected, any citizen of the Unites States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statutes of the District of Columbia.

2. Fifth Amendment, United States Constitution.

3. Fourteenth Amendment, United States Constitution.

4. Article VI, Section 2, United States Constitution

5. Article VIII, Section 1(g) and 6(d), Florida Constitution, 1968.

6. §112.531 et seq., Florida Statutes (19856).

7. §943.139 (1) and (2), Florida Statutes (1985).

9. §110.205(c) and (k), Florida Statutes (1985)

10. §27.255 (1) and (3), Florida Statutes (1985).

11. §27.25 (1), Florida Statutes (1985).

12. §943.10 (3) and (4), Florida Statutes (1985).

13. §216.011(jj), Florida Statutes (1985).

14. §768.28, Florida Statutes (1985).

STATEMENT OF THE CASE

The Plaintiff filed a 4 count suit against S. RAY GILL, in his official capacity as State Attorney for the office of the State Attorney, Fifth Judicial Circuit in and for the State of Florida and also against the office of the State Attorney.

Count 3 is an action filed pursuant to 42 U.S.C. Section 1983 (Hereinafter referred to as §1983) claiming violations of Plaintiff's constitutional rights to due process in termination from constitutionally protected employment as guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution.

Count I is an action filed pursuant to §112.531 et. seq. (1985) claiming wrongful termination for denial of procedural and substative due process

rights as provided by Florida and Federal law.

Count II is an action filed pursuant to §57.105, Florida Statutes (1985) claiming attorney's fees.

Count IV is an action for injunctive relief filed pursuant to §112.534, Florida Statutes (1985). (A 26).

The Fifth DCA said:

> "KELLY was employed as a Criminal Investigator for the State Attorney's office for a period of 18 1/2 years. On December 26, 1984, RAY GILL, the incoming State Attorney for the Fifth Judicial Circuit, telephoned KELLY and advised him that as of December 31, 1984, KELLY would be terminated from his position. No other notice or reasons were given to KELLY, Nor was there any pre-termination hearing. The official Notice of Termination listed KELLY as having been "laid off." (A 2).

The trial Court on 7\28\88, upon Defendant's Summary Judgment Motion to Dismiss all 4 Counts, ruled:

Count 3 : Motion Granted (Denial of due process filed under §1983);

Count I : Motion Granted (Wrongful Termination filed under - F.S. 112.531 et. seq. and F.S. §943.139(2);

Count 2 : Motion Granted (Attorney's Fees filed under - F.S.§57.105);

Count 4 : Plaintiff's Motion for Summary Judgment filed under F.S. §112.534, granted to the extent, "Defendant, RAY GILL, shall provide to Plaintiff in writing, reasons for the discharge of Plaintiff within 10 days of this Order." (A 12).

In regards to Count 3, the trial court granted the Defendant's Motion to Dismiss and held, "Defendants enjoy sovereign immunity from Plaintiff's attempt to

enforce Federal Civil Rights remedies in State Court" (emphasis added). (A 17). Also, "Plaintiff can point to no State Statute under which they now have, or could ever attain, a property interest in their jobs as State Attorney's Office Investigators." (A 17). Also, "F.S. 110.205 (2)(c) specifically excludes judicial officers and employees from the career civil service statutes," and this Court has declared Plaintiff to be a judicial employee. (A 18).

In regards to Count I, the trial court granted the Defendant's Motion To Dismiss and held, even though the Plaintiff falls under the protection of F.S. §112.531, et seq. by virtue of Florida Statutes §27.255 (1), (3); §27.251 (1); §943.10 (3), and §216.011 (jj) "it provides no remedies for damages or reinstatement as sought, but only injunctive relief to prevent Defendant

from further or continuing violations of the provision therein." (A 16)

The Plaintiff filed a timely appeal with the Fifth DCA and requested reversal of the Dismissal of Counts 1, 2 and 3, and on Cross-Appeal the Defendant claimed that the trial court erred in holding that the Plaintiff was protected by F.S. §112.531 et. seq. as claimed in Counts 1 and 3, and also erred in granting Plaintiff partial injunctive Relief under Count 4.

On 6/15/89, the Fifth DCA affirmed the trial court's granting of Summary Judgment in favor of the Defendant and reversed that portion of the Final Judgment that granted Summary Judgment in favor of the Plaintiff for injunctive relief and remanded the case to the trial court with instructions to file "an appropriate Order of Final Summary

Judgment consistent with this Opinion. Affirmed in part, reversed in part, and remanded."

With regards to Count 3, the Fifth DCA further held:

Count 3 : Affirmed and, "Kelly also has no action based on an alleged constitutional due process violation because no vested property interest arises from either contact or statute;" (A 8-9).

With regards to Count I, the Fifth DCA held:

Count 1 : Affirmed and, "while it is at least arguable that section 112.532(4) offers at least De Minimis procedural rights to a "Law Enforcement Officer", Kelly cannot claim a statutory violation because

of Section 112.531 et seq., as they relate to dismissal are not available to him." (A 7). This is because deputy sheriff's are Appointees of the Sheriff, a constitutional officer, and as such are terminable at will and not protected under F.S. §112.531 et.seq., consequently, this special status of deputy sheriff's name in §27.255 (3) makes it improper for the regular employed state attorney investigators, such as the Plaintiff, to have dismissal benefits under §112.531 et. seq. (A 8).

Plaintiff filed a timely appeal with the Supreme Court of Florida, on

November 24, 1989 the Supreme Court denied discretionary review. No Petition for Rehearing was permitted. (A 20).

ARGUMENT

I. WHETHER OR NOT THE STATE COURT OF APPEALS ERRED AS A MATTER OF FEDERAL LAW IN HOLDING THAT THE PLAINTIFF COULD NOT LITIGATE HIS CLAIM UNDER THE FEDERAL CIVIL RIGHTS ACT OF 1871, 42 U.S.C. SECTION 1983, IN STATE COURT BECAUSE THE STATE HAS SOVEREIGN IMMUNITY FROM PLAINTIFF'S ATTEMPT TO ENFORCE FEDERAL CIVIL RIGHTS REMEDIES IN STATE COURT?

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DAMAGES INCURRED AS A RESULT OF HIS WRONGFUL TERMINATION AND DENIAL OF DUE PROCESS RIGHTS UNDER FEDERAL AND STATE LAW?

On Appeal, the Fifth DCA, in regards to Count 3 for denial of due process filed under §1983, affirmed the trial courts Summary Judgment Dismissal and ruling that "Defendants enjoy sovereign immunity from Plaintiff's attempt to enforce federal civil rights remedies in State Court," (emphasis added) and added, "Kelly also had no action based on an alleged constitution due process violation because no vested property interest arises from either contract or statute." (A 8-9)

1. The appeal's court decision is contrary to well-established federal law and the decision of another state court of last resort. Pursuant to the supremacy clause, "Laws of the United States" are the "Supreme Law of the Land"

and " the judges of every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." (U.S. Constitution, Article VI, Section 2). Section 1983 is a law of the United States. "State Courts possess concurrent jurisdiction with federal courts over federal civil rights litigation under 42 USCS §1983." Felder v. Casey, U.S. , 101 L Ed2d 123 (1988), (at page 127). In Felder, this Honorable Court held:

> Moreover, as we noted in Patsy, Congress enacted §1983 in response to the deprivations of civil rights in the Southern State and the inability or unwillingness of authorities in those States to protect those rights or punish wrongdoers. Patsy, supra, at 503-505, 73 L

Ed 2d 172, 102 S Ct 2557; see also Wilson v. Garcia, 471 US, at 276-277, 279, 85 L Ed 2d 254, 105 S Ct 1938. Although it is true that the principal remedy Congress chose to provide injured persons was immediate access to federal courts, Patsy, supra, at 503-504, 73 L Ed 2d 172, 102 S Ct 2557, it did not leave the protection of such rights exclusively in the hand of the federal judiciary and instead conferred concurrent jurisdiction on state courts as well. 457 US, at 506-507, 73 L Ed 2d 172, 102 S Ct 2557 Id at 143.

In Martinez v. California, 444 U.S. 277 (1980), a state official, pursuant to a California statutes, claimed the defense of immunity under §1983, in a

state court, and this court said:

> "It is clear that the California immunity statute does not control this claim (under Section 1983) even though the federal cause of action is being asserted in the state court." IbId. 284.

This Court further explained in a footnote:

> "Conduct by persons action under color of state law which is wrongful under 42 USC s. 1983 or s. 1985(3) [42 USCS s. 1983 or s. 1985 (3)], cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the

proper construction may be enforced. See McLaughlin v. Iilendis, 398 287, 290 (7th Cir 1968). The immunity claim raises a question of federal law. Hampton v. Chicago, 484. F2d 602, 607 (CA7 1973), cert denied, 415 US 917, 39 L Ed 2d 471, 94 S Ct 1413, 94 S Ct 1414." IBID. (emphasis added).

In Felder v. Casey, Supra at P 141-142, This Court said:

"States, however, may no more condition the federal right to recover [under Section 1983] for violations of civil rights than bar that right altogether, particularly where those conditions grew out of a waiver of immunity which, however necessary to the assertion of state-created rights against local governments, is entirely irrelevant

insofar as the assertion of the federal right is concerned, see Martinez, 444 U.S. at 284 62 L Ed 2d 481, 100 S Ct 553." (emphasis added).

These two cases Martinez and Felder, clearly show that pursuant to federal law, the liability of the state subdivisions and their employees to actions brought under §1983 in state courts is "essentially" a question of "Pre-Emption," Felder Supra at 138. Under the Supremacy clause Pre-Emption operates as a matter of federal law. Felder, IBID. Martizez and Felder make it clear, that whether a state seeks to make a new immunity for particular officials or seeks to condition a waiver of immunity based on conditions not contained in §1983, that in either case federal law is supreme.

In Will v. Michigan Department of State Police, et al, 491 US , 105 L Ed 45, 109 S CT. (198(), This court said:

> A state that waives its sovereign immunity can be held liable for "deprivations of civil liberties" in an action brought under section 1983. IBID at 55.

The state of Florida has waived sovereign immunity under Florida Statutes §768.28 (1984) in tort actions, and under §112.5432 (3) (1984) for civil rights actions, In Mesa v. Rodriguez, Fla., 357 So. 2d 711 (Supreme Court of Florida 1978), a police officer sued a private citizen, who complained of mistreatment by the officer, for violation of the officers civil rights during performance of his official duties. The trial court entered Summary Final Judgment for the citizen and found F.S. §112.532 (3), the

cause of action statute for the suit, to be unconstitutional, and the officer appealed. The Supreme Court of Florida reversed the trial court's order, declared the questioned statute constitutional and remanded the cause for proceedings consistent with this opinion. In reaching this opinion the court, in part, said:

> "Section 112.532 (3), Florida Statues, the section of the statutes under which Mesa brought suit, is contained in Part VI of Chapter 112, Florida Statues, the chapter of general provisions governing public officers and employees. Part VI is entitled "Law Enforcement Officers," and is commonly known as the "The Policeman's Bill of Rights. The section declares that every law enforcement officer has the right

to bring a civil suit for damages suffered during the performance of his official duties or for abridgment of his civil rights arising out of the performance official duties." "The challenged statutory section simply declares that law enforcement officer have a right to recover damages suffered during performance of their official duties. And, while the part of the statues in which the challenged section is laid provides protection for the due process rights of police officers under investigation, it also provides for the airing of grievances. (at P 712-713)

§112.532 (3) also defines who civil suits can be brought against, "any person, group of persons, or organization or corporation, or the head of such

organization or corporation..." By definition an organization is a "government or governmental subdivision or agency." Black's Law Dictionary, Fifth Edition, 1979. (West Publishing Company., St. Paul Minn.) at page 991.

In regards to F.S..§110.205(2) (c) which the trial court said excludes judicial employee from the career civil service status and that the Plaintiff was a judicial employee, this section of law deals only with claims of rights for certain specified employees as outlined and contained in the various sections of chapter 110. Consequently, this statement made by the trial court is immaterial and irrelevant to the case at bar, and the trial court recognized this because regardless of the statement, the court ruled that the Plaintiff falls under the protection of F.S. §112.531 et seq. (A 14).

Nominal damages are allowed in violations of constitutional rights. Bell v Gale, 384 F. Supp. 1022 (D.C., Tex. 1974); Batista v. Weir, 340 F. 2d 74 (3d Cir, 1965).

Punitive damages are allowed in §1983 suits. Baltezore v. Concordic Parish Sheriff's Department, 767 F. 2d 702 (5th Cir, 1985).

On November 13, 1989, the Honorable U.S. Supreme Court in a §1983 case that is right on point with the claim in this count at bar, allowed a writ of Certiorari in a Florida case, Mark Howlett, et al v. Scott Rose, Supreme Court Case No. 89-5383.

In regards to count I for wrongful termination filed under Florida Statues §112.531 et seq. and §943.139, the Fifth DCA on appeal, affirmed the trial court's Summary Judgment Dismissal of the count and held that:

"While it is at least arguable that section 112.532(4) offers at least De Minimis procedural rights to a "Law Enforcement Officer," Kelly cannot claim a statutory violation because of §112.531 et seq., as they relate to dismissal are not available to him." (A 7). And this is because deputy sheriff's are appointees of the sheriff, a constitutional officer, and as such are terminable at will and not protected under F.S. §112.531 et. seq. Consequently, this special status of deputy sheriff's named in §27.255 (3) makes is improper for the regular employed State Attorney Investigators, such as the Plaintiff, to have dismissal benefits under §112.531 et. seq. (A 8).

1. The appeal's court decision is contrary to well-established federal law and the decision of another state court of last resort. The Fifth DCA's decision which limits the Plaintiff's due process rights by holding Plaintiff, although he had at least "de minimis" procedural rights pursuant to §112.532(4), Florida Statues, was not entitled to the dismissal benefits provided in said statues, is contrary to well established federal law. Pursuant to the supremacy clause, "laws of the United States" are the "supreme law of the land: and "the judges of every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding" (U.S. Const. Art. VI Section 2). Section 1983 is a federal law. In Martinez, supra at P. 284, this Court stated:

"Conduct by persons action under color of state law which is wrongful under 42 USC s. 1983 or s. 1985(3) [42 USCS s. 1983 or s. 1985 (3)], cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced. See McLaughlin v. Iilendis, 398 287, 290 (7th Cir 1968). The immunity claim raises a question of federal law. Hampton v. Chicago, 484. F2d 602, 607 (CA7 1973), cert denied, 415 US 917, 39 L Ed 2d 471, 94 S Ct 1413, 94 S Ct 1414." IBID. (emphasis added).

In Board of Regents of State Colleges v. Roth, 92 S. Ct. 2701-2705 (1972), this Court held that once a constitutional due process property right has been established, it's constitutional safeguards can not be limited. In Cleveland Board of Education v. Loudermill, 470 US 532, 84 L Ed 2d 494, 105 S ct 1487 (S Ct. 1985), this court held that constitutional due process property rights are "a matter of federal law," and could not be limited and, in part, said:

> "In Vitek v Jones, 445 US 480, 491, 63 L Ed 2d 552, 100 S Ct. 1254 (1980), we pointed out that "minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that

the preconditions to adverse official action." This conclusion was reiterated in Logan v. Zimmerman Brush Co. 455 US 422, 432, 71 L Ed 2d 265, 102 S Ct 1148 (1982) (Id at P. 523).

The Supreme Court of Florida in Mesa v. Rodriguez, supra, established that F.S. §112.531 et seq. created a constitutional due process property right or law enforcement officers defined therein. The trial court ordered that the Plaintiff was protected under F.S. §112.531 et. seq. The Fifth DCA affirmed this ruling, but limited it's safeguards to the Plaintiff, namely excluded his dismissal rights.

In Biship v. Wood, 96 S. Ct. 20-74 (1976), this court held a property interest can be created by statute ordinance or contract. In Cleveland

Board of Education v. Loudermill 470 US 2, 84 L Ed 2d 494, 105 S. Ct. (1985), this Court said:

> "Property interest are not created by the constitution, "They are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law..." Board of Regents v. Roth, Supra, at 577, 33 L Ed 2d 548, 72 S Ct. 2701. See also Paul v Davis, 424 US 693, 709, 47 L Ed 2d 405, 96 S Ct 1155 (1976). The Ohio statute plainly creates such an interest...(IBID at P501) (emphasis added). Even decisions finding no constitutional violation in termination procedures have relied on the existence of some pre-termination opportunity to respond.

For example, in Arnet, six justices found constitutional minima satisfied where the employee had access to the material upon which the charge was based and could respond orally and in writing and present rebuttal affidavits...IBID at P 504. (emphasis added). An essential principal of due process is that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case." Mullane v. Central Handover Bank and Trust Co. 339 US 306 313 94 L Ed 865 70 S Ct 652 (1950). IBID at P 503.

Florida Statutes §112.531 et seq., and §943.139 (1) (2), clearly meet the requirements of federal law to entitle the Plaintiff to a constitutionally

protected property interest in his employment with the Defendant as ruled in City of Hallandale v. Iglima, Fla App., 346 So. 2d 84 (4th DCA 1977) and Mesa v. Rodriguez, Supra at apge 712-713. (A 21) for §112.531 et seq) (A 30 for §943.139 (1) (2)).

In Inglima, Supra, two police officers brought suit against their chief and the city, seeking reinstatment and back pay, claiming a violation of statutory procedures in regards to their dismissal. The cause of action was filed under §112.532(3). The Fla. 4th DCA said:

> ...Appelles contended that they were entitled to notice of the intended disciplinary action prior to being dismissed. Section 112.532(4) clearly mandates such notice. and appellants violated appellees rights by failing to

comply with that mandate.....

(at P 84-85)

The 4th DCA remanded the case to the trial court and stated:

> ...If the trial court upon final hearing finds the appellees were wrongfully dismissed and they they are entitled to reinstatement and payment of back wages, that relief can be fully afforded them at that time. (at P 86).

In Mesa, supra at P 712-713, the Supreme Court of Florida made reference to Inglima, supra, and said that F.S. §112.531 et seq., "The policeman Bill of Rights," provides that "Every law enforcement officer" defined therein is entitled to bringing a civil suit against the state for "damages suffered during the performance of his official duties or for abridgement of his civil rights

arising out of the performance of official duties," and this section of law "provides protection for the due process rights of police officers under investigation, it also provides for the airing of grievances."(At PP 712-713).

In regards to the 5th DCA's ruling and holding concerning §27.255(3) reference the inclusion of deputy sheriff's being approved for employment by state attorneys as "Special Organized Crime Investigators" under §27.251 (A 28 for §27.255(3)) and (A 27 for §27.251(1)) and having the same rights, protections, and immunities afforded other peace or Law Enforcement Officers invalidating the Plaintiff from having dismissal rights under §112.531 et seq., this ruling and limiting of the Plaintiffs rights under F.S. §112.531 et seq., should fail because the Plaintiff does not need

§27.255(3) in any manner whatsoever to comply with the definition of law enforcement officer as prescribed in §112.531 et seq., for entitlement to all rights contained therein. However, even if the Plaintiff needed the help of §27.255(3), it would be constitutional because under Article VIII, Section 1(g) and 6(d) of the Florida Constitution of 1968, it allows deputy sheriff's to have employment protection pursuant to a Florida Statute or County Ordinance.

In Evans v Hardcastle, Fla App 339 So2d 1150 (2nd DCA 1976), the Florida 2nd DCA held that deputy sheriff's have a right to constitutionally protected employment under state statute or county ordinance pursuant to "Article 8 Sect. 1(g) and 6(d) of the Florida Constitution of 1968." (Id at Page 1151)

In Murphy v Mack, Fla., 358 So2d 822, (S. CT. 1978), The Supreme Court of Florida held that a deputy sheriff is entitled to any and all rights granted to him "by the constitution or statute law of the state," and in further explanation said:

> "The office of deputy is described in 70 Am.Jur.2d Sheriffs, Police and Constables § 2, and we quote with approval the following except therefrom: "The office of under or deputy sheriff is a common-law office; and this is the rule unless a change is effected by the constitution or statute law of the state. He holds an appointment,as distinguished from an employment. Where so clothed with power, a deputy sheriff is a public officer, although he may not be a state or

municipal officer within the meaning of constitutional provisions. A deputy sheriff is a public officer under laws which require his appointment by the sheriff to be approved by a judge, and which provide that he must take an oath of office, and confer on him powers and duties equal to those of the sheriff himself. As such, he has been held not subject to civil service regulations. And in the absence of specific language including deputy sheriffs, a deputy Sheriff has been held to be an official, and not an employee, of a county, within the meaning of a workmen's compensation act. A deputy sheriff has been held to be embraced within the words "or other county officer" contained in a statute

relating to jury service, and, a special deputy, or one employed in particular cases has been held to be an officer of the state under a statutory provision relating thereto." (Emphasis added) (Id at P825).

One section of law within F.S. 112.531 et. seq. specifically names "deputy sheriff's namely section 112. 533(1) and 112. 533 (2) (a), to wit:

"every agency employing law enforcement officers or correctional officers shall establish and put into operation a system for the receipt investigation and determination of complaints received by such employing agency from any person. (emphasis added). 112.533 (2) (a). A complaint filed against a law enforcement agency or correctional

agency and all information obtained pursuant to the investigation by the agency of such complaint shall be confidential until the conclusion of the internal investigation or at such time that the investigation ceases to be active without a finding relating to probable cause....(emphasis added).

By adding "including a deputy sheriff," when identifying "law enforcement officer," in sub-section (2) (a), clearly shows that the Florida Legislature did not intend for deputy sheriffs employed by the sheriff to be included as law enforcement officers "employed full-time by" an "employing agency" that they define in F.S. 112.531 entitled to constitutional due process rights under F.S.112.531

et seq. when they enacted it is 1974.

However, the simultaneous modification of F.S. 27.255 (3) (A 29), with the 1978 enactment of F.S. 27.251 (A 27), a statute creating special organized crime investigators to be employed on a "full-time basis" by state attorneys for "a special task force to investigate matters involving organized crime," clearly shows that with the creation of this special category of state attorney investigators the legislature expressly intended for deputy sheriff's defined within this newly created category of state attorney investigators to have "the same rights, protections and immunities afforded other peace or law enforcement officers" as defined in §112.531 et seq. This is permissable under the Florida constitution as well as under federal law as explained in Cleveland Board of

Education v. Lauderhill, supra, when this court said "property interests are not created by the constitution they are created and their dimensions are defined by the existing rules or understandings that stem from an independent source such as state law..." Board of Regents v Roth, supra at 577, 33 L Ed 2d 548, 92 S ct 2701. See also Paul v. Davis, 424 U.S. 693, 709, 47 L Ed 2d 405, 96 S Ct 1155 (1976). (emphasis added) (Id at P 501).